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# Fraud in the Inception of Bills and Notes

WILLIAM E. BRITTON†

If a party signs his name to an instrument which is negotiable in fact, under what circumstances may he be entitled to attack the validity of the execution of the instrument even against a holder in due course? Or, stated otherwise, what fraudulent practices will operate as a real defense? When, in other words, may a genuine signature be given the legal effect of a forgery in the law of negotiable paper?

This question was first presented to the English Courts in 1869, in the case of *Foster v. MacKinnon*.<sup>1</sup> The defendant indorsed a bill of exchange, upon the representation of the party requesting the signature, that the instrument was a guaranty, he believing that it was such a guaranty similar to the one he had theretofore signed at the request of the same party for the accommodation of a railway company, upon which no liability had resulted to him. The defendant was far advanced in years, but there was no evidence that he could not read. Defendant saw only the back of the instrument, which was in the ordinary shape of a bill of exchange and bore a stamp, the impress of which was visible through the paper. The plaintiff was a holder in due course. The Lord Chief Justice instructed the jury that, "If the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict."<sup>2</sup> The verdict was for the defendant but a new trial was ordered because the court concluded that the evidence did not support the verdict. The giving of the quoted instruction was sustained. In discussing the principle involved, Byles, J., said: "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract

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<sup>1</sup>L. R. 4 C. P. (Eng.) 704 (1869).

<sup>2</sup>*Idem*, at p. 705.

pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."<sup>1b</sup> As the historical basis for this rule, the court relied upon certain authorities relating to deeds and, in part, upon a dictum from an American case.<sup>2</sup> The case at bar was regarded by the court as one in which that precise question had not arisen before. The rule announced had, however, been recognized by statute in the United States 40 years before *Foster v. MacKinnon*.<sup>3</sup> Under the shibboleth of *stare decisis*, it might be interesting but perhaps not greatly profitable to question the security of the foundations of this leading English authority, but the wisdom or lack of wisdom contained in it, is determinable largely, by an inquiry into the history of the rule during its half century of existence.

*Foster v. MacKinnon* has repeatedly been recognized by American courts as the source and principal authority of the rule therein discussed. With the exception of the Illinois cases<sup>4</sup> no case has been found which presents this precise question in its relation to negotiable paper prior to *Foster v. MacKinnon*. But since 1869, more than a hundred cases have arisen in this country in which the question has been presented and the rule discussed or applied. A new rule of law, whether of judicial or legislative origin, invites litigation. Slightly more than a third of the total number of cases concerned with this

<sup>1b</sup>*Idem*, at p. 711.

<sup>2</sup>*Thoroughgood's Case*, 2 Co. Rep. (Eng.) 9a (1582); *Edwards v. Brown*, 1 Cromp. & J. (Eng.) 307 (1831); *Swan v. North British Australasian Land Co.*, 2 Hurlst. & C. (Eng.) 175 (1863); and a dictum in *Putnam v. Sullivan*, 4 Mass. 45 (1808).

<sup>3</sup>An act of the General Assembly of Illinois, approved January 3, 1827, contained the following section: "If any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee or assignees of such instrument."

This statute was discussed but not applied, for the facts did not fall within its terms, in *Wood v. Hynes*, 1 Scam. (Ill.) 103 (1833); *Mulford v. Shepard*, 1 Scam. (Ill.) 583 (1839); *Adams v. Wooldridge*, 3 Scam. (Ill.) 255 (1841); and *Latham v. Smith*, 45 Ill. 25, 27 (1866). In the last case the court said: "A fraud in obtaining a note may consist of any artifice practiced upon a person to induce him to execute it, when he did not intend to do such act. \* \* \* the fraud \* \* \* must relate to the obtention of the instrument itself, and not to the consideration \* \* \* it is such a trick or device as induces the giving of one character of instrument under the belief that it is another of a different character."

<sup>4</sup>See *supra*, n. 3.

species of fraud were passed upon by reviewing courts in the ten year period following the decision in *Foster v. MacKinnon*. From 1880 to 1890, about one-fifth of the cases appeared. There has been a steadily decreasing number since that time. The situation only occasionally reaches the upper courts at the present time. It is a little strange that the enactment of the Negotiable Instruments Law has not reinvited litigation, especially in view of the fact that the uniform draft makes no express reference to the rule, while in two states it was deemed either necessary or desirable to add a clause expressly preserving this real defense.<sup>5</sup>

The year following the decision in *Foster v. MacKinnon*, the question arose in New York, and on the authority of the English case the same result was reached.<sup>6</sup> Like results, but with occasional modifications, have followed in other states. In a few states the rule has been repudiated.<sup>6</sup>

<sup>5</sup>Sec. 75 of the Illinois Act (Sec. 57 of the N. I. L.) expressly incorporates the section of the Act of 1827, quoted *supra*, n. 3.

Sec. 6015 of the Minnesota General Statutes, passed for the purpose of changing the rule in *Mackey v. Peterson*, 29 Minn. 298 (1882), which virtually repudiated *Foster v. MacKinnon*, while not expressly contained in the Negotiable Instruments Law of that State is apparently regarded as in force. *Stevens v. Pearson*, 138 Minn. 72 (1917).

Sec. 1676-25 of the Wisconsin Act (Sec. 55 of the N. I. L.) expressly preserves the defense.

<sup>6</sup>*California*: *Bedell v. Hering*, 77 Cal. 572 (1888).

*Georgia*: *Grooms v. Olliff & Co.*, 93 Ga. 789 (1894).

*Illinois*: *Woods v. Hynes*, *supra*, n. 3; *Mulford v. Shepard*, *supra*, n. 3; *Latham v. Smith*, *supra*, n. 3; *Murray v. Beckwith*, 48 Ill. 391 (1868); *Taylor v. Atchison*, 54 Ill. 196 (1870); *Leach v. Nichols*, 55 Ill. 273 (1870); *Richardson v. Schirtz*, 59 Ill. 313 (1871); *Mead v. Munson*, 60 Ill. 49 (1871); *Sims v. Bice*, 67 Ill. 88 (1873); *Champion v. Ulmer*, 70 Ill. 322 (1873); *Anderson v. Warne*, 71 Ill. 20 (1873); *Hubbard v. Rankin*, 71 Ill. 129 (1873); *Homes v. Hale*, 71 Ill. 552 (1874); *Hewitt v. Jones*, 72 Ill. 218 (1874); *Van Brunt v. Singley*, 85 Ill. 281 (1877); *Auten v. Gruner*, 90 Ill. 300 (1878).

*Indiana*: *Cline v. Guthrie*, 42 Ind. 227 (1873); *Nebeker v. Cutsinger*, 48 Ind. 436 (1874); *Kimble v. Christie*, 55 Ind. 140 (1876); *Maxwell v. Morehart*, 66 Ind. 301 (1879); *Fisher v. Von Behren*, 70 Ind. 19 (1880); *Woolen v. Whitacre*, 73 Ind. 198 (1880); *Ruddell v. Dillman*, 73 Ind. 518 (1881); *Webb v. Corbin*, 78 Ind. 403 (1881); *Williams v. Stoll*, 79 Ind. 80 (1881); *Yeagley v. Webb*, 86 Ind. 424 (1882); *Mitchell v. Tomlinson*, 91 Ind. 167 (1883); *Palmer v. Poor*, 121 Ind. 135 (1889); *Lindley v. Hofman*, 22 Ind. App. 237 (1899); *Home Nat. Bank v. Hill*, 165 Ind. 226 (1905).

*Iowa*: *McDonald v. Muscatine Nat. Bank*, 27 Iowa 319 (1869); *Caulkins v. Whisler*, 29 Iowa 495 (1870); *Douglass v. Matting*, 29 Iowa 498 (1870); *Wright, Dryden & Co. v. Flinn*, 33 Iowa 159 (1871); *Fayette Co. Savings Bank v. Steffes*, 54 Iowa 214 (1880); *First Nat. Bank v. Zeims*, 93 Iowa 140 (1894); *Green v. Wilkie*, 98 Iowa 74 (1896); *First Nat. Bank v. Hall*, 169 Iowa 218 (1915).

*Kansas*: *Ort v. Fowler*, 31 Kan. 478 (1884).

*Maine*: *Abbott v. Rose*, 62 Me. 194 (1873); *Nichols v. Parker*, 75 Me. 334 (1883); *Breckenridge v. Lewis*, 84 Me. 349 (1892); *Biddeford Nat. Bank v. Hill*, 102 Me. 346 (1907).

*Massachusetts*: *Trambly v. Ricard*, 130 Mass. 259 (1880); *Freedley v. French*, 154 Mass. 339 (1891).

*Michigan*: *Gibbs v. Linabury*, 22 Mich. 479 (1871); *Anderson v. Walter*, 34 Mich. 113 (1876); *Soper v. Peck*, 51 Mich. 563 (1883); *First Nat. Bank of*

The typical situation arises when one party induces another to sign an instrument which is in fact negotiable but which the signer, as a result of misrepresentations of the procurer of the signature, believes to be an instrument of a different character, such as a receipt, simple contract, agency agreement, lease, etc. The most common case is that in which the signer is led to believe that he is signing an agreement appointing him as an agent to sell some article on commission. In the seventies and eighties there appears to have been, journeying about the country, quite a number of individuals who possessed all the inclinations of the robber and all the dreams of unearned riches of a J. Rufus Wallingford, but they lacked the requisite boldness for larceny in the orthodox manner and they were sadly deficient in that imaginative resourcefulness so essential for the artistic separation of capital from the possession of its owner. One should not be too hard on them, however, for they did succeed amazingly well, in reducing materially the assets of many a struggling farmer.

*Sturgis v. Deal*, 55 Mich. 592 (1885); *Beard v. Hill*, 131 Mich. 246 (1902); *Van Slyke v. Rooks*, 181 Mich. 88 (1914).

*Minnesota*: *Yellow Medicine Co. Bank v. Tagley*, 57 Minn. 391 (1894); *Hinkley v. Freick*, 112 Minn. 329 (1910); *Stevens v. Pearson*, 138 Minn. 72 (1917).

*Missouri*: *Briggs v. Ewart*, 51 Mo. 245 (1873); *Martin v. Sinylee*, 55 Mo. 577 (1874); *Corby Exrx. v. Weddle*, 57 Mo. 452 (1874); *Shirts v. Overjohn*, 60 Mo. 305 (1875); *Cowgill v. Petifish*, 51 Mo. App. 264 (1892); *First Nat. Bank v. Hall*, 129 Mo. App. 286 (1908).

*Nebraska*: *First Nat. Bank v. Lierman*, 5 Neb. 247 (1876); *Dinsmore & Co. v. Stimbert*, 12 Neb. 433 (1882); *Willard v. Nelson*, 35 Neb. 651 (1892); *Shenandoah Nat. Bank v. Gravatte*, 4 Neb. Unof. 591, 95 N. W. 694 (1903); *Bothell v. Miller*, 87 Neb. 835 (1910).

*New Hampshire*: *Citizens' Nat. Bank v. Smith*, 55 N. H. 593 (1875).

*New York*: *Whitney v. Snyder*, 2 Lans. (N. Y.) 477 (1870); *Chapman v. Rose*, 56 N. Y. 137 (1874); *Nat. Exchange Bank of Auburn v. Veneman*, 43 Hun. (N. Y.) 241 (1887); *Marden v. Dorthy*, 160 N. Y. 39 (1899).

*North Dakota*: *Porter v. Hardy*, 10 N. D. 551 (1901).

*Ohio*: *DeCamp v. Hanna*, 29 Oh. St. 467 (1876); *Ross v. Doland*, 29 Oh. St. 473 (1876); *Winchell v. Crider*, 29 Oh. St. 480 (1876); *Perkins v. White*, 36 Oh. St. 530 (1881).

*Oklahoma*: *First Nat. Bank of Watonga v. Wade*, 27 Okla. 102 (1910).

*Oregon*: *Brown v. Feldwert*, 46 Or. 363 (1905).

*Pennsylvania*: *Brown v. Reed*, 79 Pa. 370 (1875).

*Rhode Island*: *Millard v. Barton*, 13 R. I. 601 (1882).

*Washington*: *Yakima Valley Bank v. McAllister*, 37 Wash. 566 (1905).

*Wisconsin*: *Walker v. Ebert*, 29 Wis. 194 (1871); *Kellogg v. Steiner*, 29 Wis. 626 (1872); *Butler v. Carns*, 37 Wis. 61 (1875); *Griffiths v. Kellogg*, 39 Wis. 290 (1876); *Bowers v. Thomas*, 62 Wis. 480 (1885); *Keller v. Schmidt*, 104 Wis. 596 (1899); *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109 (1900); *Keller v. Ruppold*, 115 Wis. 636 (1902); *Aukland v. Arnold*, 131 Wis. 64 (1907).

CONTRA:

*Connecticut*: *Rowland v. Fowler*, 47 Conn. 347 (1879).

*Minnesota*: *Mackey v. Peterson*, *supra*, n. 5; *Ward v. Johnson*, 51 Min. 480 (1892). Rule subsequently changed by statute, see *Yellow Medicine Co. Bank v. Tagley*, 57 Minn. 391 (1894).

*West Virginia*: *First Nat. Bank of Parkersburg v. Johns*, 22 W. Va. 520 (1883); *Leonard v. Dougherty*, 22 W. Va. 536 (1883); *Tower v. Whip*, 53 W. Va. 158 (1903).

Equipped with a patented hayfork or potato digger, they sought out the aged, the sick, and the illiterate. They painted rosy pictures of commissions earned without effort. They produced a contract of agency. It was duly signed. The patent vender retired with a perfectly good negotiable instrument and shortly thereafter the note reposed safely in a steel vault of the village bank. Nor should there be a failure to note the more modern variation introduced by the white and colored gentlemen of the bar, who jointly conceived the bolder project of acting upon a self-appointed commission, solemnly represented to have been charged by executive authority to prepare the last wills and testaments of all colored people within the state.<sup>7</sup> The sober legal aspects of a transaction where one of two innocent parties must suffer through the wrongs of a third eventually are rehearsed in the courts and the loss is finally thrown upon one or the other of the parties, depending upon the facts of the particular case.

As commonly stated, the rule consists of two branches. The first asserts that a party who has in fact placed his signature upon a negotiable instrument, will have no right to set up personal defenses against the holder in due course if the signer knew certain facts, although such knowledge did not embrace all of the facts appearing upon the instrument signed nor all of their legal consequences. That is, knowledge, by the signer, of facts X and Y, is said to be a condition precedent to the right of the holder in due course to recover from the signer free from personal defenses. Much of the litigation is centered in the effort to solve for X and Y. The second part of the rule, in reality the more important, declares that even though the signer did not know facts X and Y, the same effect will follow, i. e., the holder in due course will recover from him free from his personal defenses, if the signer's lack of knowledge of facts X and Y is attributable to his negligence. Most of the cases are concerned with the question: what constitutes negligence? Thus the second part of the rule destroys the first part by admitting that knowledge of facts X and Y is not really essential in any case. The principle will be discussed in this form, although it is possible to phrase it in terms of knowledge, let us say, of facts Z and W, omitting entirely the second branch of the rule.

It will be convenient to discuss both phases of the rule together. With respect to the first branch, it needs merely to be remarked here, that the courts have not, as a rule, indicated with clearness just what facts must be known by the signer to render him liable to the

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<sup>7</sup>First Nat. Bank of Watonga v. Wade, 27 Okla. 102 (1910). [This and most of the cases subsequently referred to are also cited in note 6, *supra*—Ed.]

holder in due course. The phrases commonly employed are: the signer must know "the character of the paper,"<sup>8</sup> or, he must know its "contents and effect,"<sup>9</sup> or, that, "he intends to bind himself in some way,"<sup>10</sup> or, that, "he means to make an obligation in writing,"<sup>11</sup> or, that, "the act done must have the assent of his will,"<sup>12</sup> or, that, "the act of signing must be voluntary."<sup>13</sup> Whatever the facts are which are referred to by these general statements, in practically all of the cases it is admitted, either expressly or by implication, that if the signer did not possess this knowledge he will still be liable if negligent in not obtaining it. The question then is: what constitutes negligent execution?

The decisions with respect to the question of negligence are governed by three fairly severable groups of facts: (I) the legal characteristics of the paper which the signer thinks he signs, (II) the physical condition and educational equipment of the signer, and (III) the nature of the opportunity possessed by the signer, at the time he signed, for ascertaining the legal characteristics of the paper actually executed.

These three aspects of negligent conduct, as they affect the liability of parties to negotiable paper, will be taken up in this order not only to indicate that, while interrelated, they may be considered separately in determining the issue as to negligent execution but also to emphasize the relative importance of each. The legal characteristics of the paper which the signer thinks he is signing is an important element, but it is not so important as his physical condition and education at the time he signs. Moreover, irrespective of the legal characteristics of the paper which the signer thinks he is signing, and irrespective of his then physical condition and educational equipment, the most important element in determining the issue of negligence, concerns the nature of the opportunity possessed by the signer for ascertaining the true legal effect of the paper actually executed. Taken broadly, of course, this aspect really comprehends the other two.

In all the cases under discussion the signer actually affixes his signature to a negotiable instrument. His understanding of the total effect of the instrument signed by him is always different from that which the law declares it to be. What he thinks it is, is an important

<sup>8</sup>Cline v. Guthrie, 42 Ind. 227 (1873).

<sup>9</sup>Freedley v. French, 154 Mass. 339 (1891).

<sup>10</sup>Caulkins v. Whisler, 29 Iowa 495 (1870).

<sup>11</sup>Fayette Co. Savings Bank v. Steffes, 54 Iowa 214<sup>5</sup> (1880); <sup>12</sup>Shirts v. Overjohn, 60 Mo. 305 (1875); Chapman v. Rose, 56 N. Y. 137 (1874).

<sup>13</sup>Gibbs v. Linabury, 22 Mich. 479 (1871).

<sup>14</sup>Mackey v. Peterson, 29 Minn. 298 (1882).

element in determining his negligence.<sup>14</sup> The cases fall roughly into five groups: (1) those in which the signer intended to sign a paper which would impose no duty upon him whatsoever,<sup>15</sup> (2) those intended by him to impose upon him some conditional or unconditional duty other than to pay money,<sup>16</sup> (3) those intended to create a simple

<sup>14</sup>*Nat. Exchange Bank of Auburn v. Veneman*, 43 Hun. (N. Y.) 241, 245 (1887): "The nature and character of the paper intended to be executed must always be considered in determining the question of the defendant's negligence \* \* \*. If a farmer, who could not read, should sell and deliver to a mill a load of grain and receive pay therefore, and should then be requested to sign a voucher in the miller's counting room, and should sign a paper prepared for that purpose and it turned out to be a negotiable instrument, could it be said that the farmer was guilty of negligence, as matter of law, because he did not seek some third person for the purpose of ascertaining the import of the writing? The case supposed is not like the one before us in all respects, but it has been stated for the purpose of illustrating that the question of negligence is not always one of law and often becomes a question of fact for the \* \* \* jury."

<sup>15</sup>*Cline v. Guthrie*, 42 Ind. 227, 230, 236 (1873): Judgment for plaintiff reversed. Maker signed his name to a blank piece of paper "to enable [the other] to see how defendant's name was spelled." This transaction grew out of the appointment of the maker as an agent. "It is well settled \* \* \* that the party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included."

*Palmer v. Poor*, 121 Ind. 135 (1889): Judgment for defendant affirmed. Maker placed his name and address on a card at the request of payee so that payee could send him ten gallons of paint free.

*Home Nat. Bank v. Hill*, 165 Ind. 226 (1905): Judgment for defendant affirmed. Maker after reading a part of a petition which concerned his release as surety upon a guardian's bond, signed his name on one of the sheets, supposing it to be a part of the petition but it was in fact a note.

*Caulkins v. Whisler*, 29 Iowa 495, 496, 497 (1870): Judgment for defendant affirmed. Maker signed a blank piece of paper to be handed to certain manufacturers so that they would know his signature when he should order certain machines. Referring to cases holding the maker liable the court said: "But in all of such cases the makers intended to execute an instrument that should be binding upon them. [In the case at bar the maker] did not intrust his signature to the possession of the forger for the purpose of binding himself by a contract."

*First Nat. Bank v. Zeims*, 93 Iowa 140, 145 (1894): Judgment for defendant affirmed. Maker signed his name to a blank piece of paper for the sole purpose of its being used as a means of identifying him. "There is a sharp distinction between cases where the signer of the paper executes an instrument intending it to be a contract in some form and where he merely signs a paper to furnish the means of identification."

*Mackey v. Peterson*, *supra*, n. 13: Judgment for plaintiff affirmed. Maker supposed he was signing a receipt for a plow. By implication this case repudiates the rule in *Foster v. MacKinnon*.

*Soper v. Peck*, 51 Mich. 563 (1883): Judgment for defendant affirmed. Maker supposed he was signing "a statement to send to the company to let them know that [he was] their lawful agent."

*First Nat. Bank of Sturgis v. Deal*, 55 Mich. 592 (1885): Judgment for defendant affirmed. Maker signed what he supposed was an application for insurance.

*Shanandoah Nat. Bank v. Gravatte*, 4 Neb. Unof. 591, 95 N. W. 694 (1903): Judgment for defendant affirmed. Maker signed a note thinking it was a receipt for fruit trees.

<sup>16</sup>In the following cases the maker signed a note under the assumption that it was an agreement appointing him as an agent or a duplicate of the same. In



contract duty, conditional or unconditional, to pay money,<sup>17</sup> (4) those intended by him to be commercial instruments of the non-negotiable type,<sup>18</sup> and (5) those intended to be negotiable instruments but the signer believing that some of the terms contained therein are different from what they are.<sup>19</sup>

The following statement is made with some little hesitancy, because the courts have not, in so many words expressed it, but it is believed that the results reached in the decisions support the view that, where the facts referred to in (II) and (III) above mentioned remain constant, the law imposes a lesser duty of care in case (1), where the signer signs a paper intending that it shall not evidence a

some of the cases judgment was for the maker, in others, for the holder in due course, the result depending in part on other factors.

*Nebeker v. Cutsinger*, 48 Ind. 436 (1874); *Webb v. Corbin*, 78 Ind. 403 (1881); *Mitchell v. Tomlinson*, 91 Ind. 167 (1883); *Lindley v. Hofman*, 22 Ind. App. 237 (1899); *Douglass v. Matting*, 29 Iowa 498 (1870); *Ort v. Fowler*, 31 Kan. 478 (1884); *Abbott v. Rose*, 62 Me. 194 (1873); *Gibbs v. Linabury*, *supra*, n. 12; *Briggs v. Ewart*, 51 Mo. 245 (1873); *Cowgill v. Petifish*, 51 Mo. App. 264 (1892); *First Nat. Bank v. Hall*, 129 Mo. App. 286 (1908); *Citizens' Nat. Bank v. Smith*, 55 N. H. 593 (1875); *Chapman v. Rose*, *supra*, n. 11; *Brown v. Reed*, 79 Pa. 370 (1875); *First Nat. Bank of Watonga v. Wade*, *supra*, n. 7; Maker signed what he supposed to be a will and power of attorney.

<sup>17</sup>*McDonald v. Muscatine Nat. Bank*, 27 Iowa 319 (1869): Maker signed an instrument in blank and delivered it for the purpose of having it filled up as an order for an evaporator. Maker held liable to the holder in due course.

*Beard v. Hill*, 131 Mich. 246 (1902): Judgment for plaintiff reversed. Maker signed what he supposed was a contract employing a physician to render professional services.

*Van Slyke v. Rooks*, 181 Mich. 88 (1914): Judgment for defendant reversed. Defendant signed what he thought was an agreement to form an association for the purchase of a stallion. Virtually overrules prior Michigan cases on the point as to what constitutes negligence.

*Porter v. Hardy*, 10 N. D. 551 (1901): Judgment for defendant affirmed. Maker thought he signed a simple contract for the purchase of a stallion.

*Keller v. Ruppold*, 115 Wis. 636 (1902): Judgment for defendant affirmed. Maker signed a note supposing it to be a policy of insurance.

<sup>18</sup>*Kellogg v. Steiner*, 29 Wis. 626 (1872): Judgment for plaintiff reversed. "If the defendant was tricked into the signing of a negotiable note, when, in fact, he only intended to sign one which was not negotiable, and it was so agreed \* \* \* between the parties, \* \* \* and the defendant [was without] negligence \* \* \* the instrument \* \* \* is not binding upon the defendant \* \* \*"

<sup>19</sup>*Woods v. Hynes*, 1 Scam. (Ill.) 103, 105 (1833): "If a person represent a note to contain a particular sum, when, in truth, the amount is much greater, here would be a case contemplated by the statute."

*Fayette Co. Savings Bank v. Steffes*, 54 Iowa 214, 215 (1880): Judgment for plaintiff affirmed. Maker intended to sign a negotiable note not knowing all of its contents. "A sharp distinction is made between such a case and one where the maker supposed that he was executing an instrument not a note." This statement is dictum but apparently *contra* to *Griffiths v. Kellogg*.

*Griffiths v. Kellogg*, 39 Wis. 290, 294 (1876): Judgment for defendant affirmed. Maker signed a note intending it to be for a certain sum when in fact it was for a larger sum. "It was, indeed, contended that this doctrine is not applicable to negotiable paper, when the maker is not deceived as to the nature of the paper, but only as to the amount or other details of it. But it has been frequently applied to negotiable paper in this court." *Bowers v. Thomas*, 62 Wis. 480 (1885), *accord*.

legal obligation, than it does in case (2) where he does intend to sign a paper to evidence some kind of a legal duty. That is, the least duty of care is owed in case (1). A higher duty of care is owed in case (2). A still higher duty of care is owed in case (3) and so on. Finally in a case where he intends to execute a negotiable instrument but is led to believe that its terms are different from what they are, he is then under a duty to exercise the highest degree of care. There exists some doubt as to whether these distinctions are sufficiently vital to warrant the framing of instructions which feature them. They merely indicate a tendency of the courts, when reviewing cases on the evidence, to consider them, other circumstances remaining equal, as more or less determining on the question of negligence.

On the merits of this suggestion, as conceived by the writer, it is entirely proper for the law to be charitably disposed toward the party who, for example, has signed a negotiable instrument under the assumption that he is giving to the party with whom he dealt a specimen of his handwriting, but that at the other extreme, where the signer knowingly signs a negotiable instrument but is misled as to its contents, this benevolent spirit may well be encouraged to retire almost to the vanishing point.

A subordinate point may here be adverted to. It will be noticed that some courts have considered the legal characteristics of the paper, supposed by the signer to have been executed, as bearing upon the first branch of the rule, and apparently as having no bearing upon the question of negligence. For example, some courts have declared that the signer will not be liable to the holder in due course unless he knowingly affixes his signature to an instrument intended by him to impose upon him some kind of obligation. That is, if he signs intending to execute a simple contract, he is liable to the holder in due course of the negotiable instrument actually executed. If he signs a paper intended by him as a receipt or as a means of identification he would not be liable. Most courts have merely said that the signer must know the character of the instrument which he signs. If such statements as these be taken literally the liability or non-liability of the signer to the holder in due course would depend solely upon the extent of his knowledge of the character of the instrument irrespective of his negligence in not finding out what it was he signed. The actual decisions have not, however, declared that negligence was unimportant as some of these statements referred to might indicate. They do consider negligence and declare, for instance, the possibility of one's being liable to a holder in due course even when

he thought he signed a receipt only.<sup>20</sup> The point comes down to this, therefore, that the legal characteristics of the paper supposed by the signer to have been executed by him are of importance in determining whether the signer was negligent, perhaps to the degree and extent indicated in the preceding paragraph.

Consideration of the legal aspects of the instrument which the signer supposed he was signing is not alone sufficient to determine the issue of negligence. Perhaps more importance is to be attached to the physical condition of the signer and to his ability to read. While these circumstances are embodied in the third group of circumstances which affect the question of the signer's negligence, and will be adverted to in that connection, the physical condition of the signer and his literacy or illiteracy, may, at least as a matter of form, be regarded independently. There is much more reason, for example, in regarding one who is actively engaged in the conduct of a business enterprise, accustomed daily to the execution of various kinds of commercial instruments, and to the transaction of business generally, as negligent in executing a negotiable instrument under the assumption that it is a receipt, than there is for holding that an elderly lady, unaccustomed to business, illiterate and in poor health is negligent for doing the same thing. In the case supposed, other circumstances remaining equal, the business man should be liable to the holder in due course while the elderly lady should not be liable. The cases

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<sup>20</sup>Gibbs v. Linabury, *supra*, n. 12, at p. 492: Judgment for plaintiff reversed. "It would \* \* \* seem that the act which may involve a man in consequences under the operation of this maxim must have the assent of the will of the actor. Now, when a party never designed to put \* \* \* any sort of negotiable paper in circulation \* \* \* how can it be said that his will in any way assented to the \* \* \* contract so as to make him an object of the rule?" Maker supposed he was signing an agency agreement.

Briggs v. Ewart, *supra*, n. 16, at p. 250: Judgment for plaintiff reversed. Maker signed what he thought was a duplicate of an agency agreement. "The point is that the mind must act in the execution of the paper. \* \* \* If the mind is drawn away from it by fraud or otherwise, and the party is induced to sign it as and for another instrument different from what it purports to be, then there is no consent given and no delivery made or authorized to be made of the paper so signed."

Shirts v. Overjohn, *supra*, n. 11, at p. 309: Judgment for defendant reversed. Maker signed a note thinking it a receipt for a plow. "The result of the best considered cases on this subject may be generally stated to be, that where it appears that the party sought to be charged, intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or by relying upon the representations of another, as to the contents of the instrument presented for his signature, \* \* \* he cannot be heard to impeach its validity in the hands of a *bona fide* holder." This case disapproves of the emphasis thrown upon the element of intention by the court in Briggs v. Ewart, 51 Mo. 245 (1873) and re-establishes the element of negligence as equally important.

cited in the note<sup>21</sup> indicate the trend of the decisions along this line. There can be no question that these circumstances have an important bearing upon the issue of liability or non-liability to the holder in due course.

In every case where a person is tricked into signing a negotiable instrument the broad question presented is: why did the signer not know what he signed? This question is really inclusive of all other matters pertaining to the issue of negligence. Granted that he does not know, his ignorance does not exempt him from liability to the holder in due course. He will be so liable if he had an opportunity to discover the truth but neglected to avail himself of it. The greater part of the discussion in the cases is directed toward the solution of the question: did the signer in this particular case possess this opportunity?

The cases, in the first instance, may be conveniently divided into two groups: those in which the signer was able to read, and those in which the signer was unable to read. Ability of the signer to read tends very strongly to prove negligence but it does not always do so. A person who can read, as a rule, will be negligent, but there are many cases where the circumstances free him from this charge and

<sup>21</sup>The following cases treat the facts of old age, illness, infirmity, and illiteracy as material:

Mitchell v. Tomlinson, *supra*, n. 16: Maker was 70 years of age, an invalid for 30 years, and could read only with great difficulty. Judgment for maker affirmed.

Palmer v. Poor, *supra*, n. 15: In affirming judgment for the maker the court took into consideration the fact that defendant was "old, feeble and ill."

Green v. Wilkie, 98 Iowa 74 (1896): Judgment for maker affirmed. Maker illiterate.

Soper v. Peck, *supra*, n. 15: Judgment for maker affirmed. Maker was "a poor scholar."

Beard v. Hill, *supra*, n. 17: Judgment for plaintiff reversed. Defendant could not read or write.

Willard v. Nelson, 35 Neb. 651 (1892): Judgment for maker affirmed. Maker illiterate.

Whitney v. Snyder, 2 Lans. (N. Y.) 477 (1870): Judgment for plaintiff reversed because the trial court excluded evidence "that he [defendant] was unable to read \* \* \*."

Nat. Exchange Bank v. Veneman, *supra*, n. 14, at p. 245: Judgment for defendant affirmed. "As the maker could not read the English language he was obliged to rely upon the representations made by the other party or consult some third person. \* \* \* It cannot be said that it was negligence *per se* not to seek his neighbors \* \* \*."

First Nat. Bank of Watonga v. Wade, *supra*, n. 7, 16: Decree of cancellation affirmed. Maker was an "aged, infirm negress, of poor eyesight and hearing, unable to read."

Walker v. Ebert, 29 Wis. 194 (1871): Directed verdict for plaintiff reversed. Maker, a German, could not read or write English.

Griffiths v. Kellogg, *supra*, n. 19, at p. 295: Judgment for defendant affirmed. "Whether the respondent, being unable to read the paper which she signed, was guilty of negligence to estop her from setting up this defense against a *bona fide* purchaser, was fairly submitted to the jury, and answered by their verdict for her."

Bowers v. Thomas, *supra*, n. 19: Judgment for plaintiff reversed. Maker 72 years of age, could not read or write.

he will be held not liable. On the other hand, proof of a person's inability to read tends strongly to prove freedom from negligence, but here again, the circumstances may be such that he should be held negligent and, therefore, liable to the holder in due course.

When the signer is not able to read, the possibility of his gaining information as to the contents of the instrument submitted to him rests either with the party with whom he is dealing or with some third party. There are two situations. The rule with respect to the first is, that a party who is unable to read, either because of illiteracy or seriously impaired vision, there being no third person present or readily available, will not be negligent in relying upon a statement by the party with whom he is dealing as to the contents of the paper which he signs.<sup>22</sup> The rule with respect to the second situation is,

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<sup>22</sup>*Webb v. Corbin*, *supra*, n. 16: Judgment for defendant affirmed. The evidence affirmatively showed that the maker lived by himself and that at the time of signing there was no one, other than the agent of the payee, nearer than two miles away. On these facts, defendant maker was held not negligent in relying upon the reading of the adverse party.

*Green v. Willkie*, *supra*, n. 21: Judgment for defendant affirmed. Defendant who could not read relied upon the statement of the husband of the payee, the procurer of the signature, the payee not present, for his information concerning the contents of the instrument, but the court held that he was not negligent because the proposed transaction was between himself and his father, and the party who fraudulently procured his signature was apparently acting as a friendly assistant and not as an adverse party. The court said, at p. 80: "This was a case remarkably free from reason for, or grounds of suspicion. \* \* \* We think the case is free from negligence on the part of defendant."

*Willard v. Nelson*, *supra*, n. 21: Judgment for defendant affirmed. Maker was illiterate. The court said, at p. 653: "Only the two parties to the transaction being present when the paper was signed, the defendant was compelled to trust to the reading thereof to the agent of the payees. Whether the defendant was guilty of negligence or not was for the jury to determine from all the facts and circumstances in evidence. If he was free from negligence or fault and was tricked into signing the note, as the jury must have found, \* \* \* then the plaintiff cannot recover, although he may be a *bona fide* holder."

*Contra:*

*Mackey v. Peterson*, *supra*, n. 13, 15: Judgment for plaintiff affirmed. Maker could not read English and there was no one within a half-mile who could read English. Court said, at p. 301: "Where a party, through neglect of precautions within his power, affixes his name to that kind of paper without knowing its character, the consequent loss ought not to be shifted from him to a *bona fide* purchaser of the paper. Tested by this rule, the facts which defendant offered to prove would have been no defense. He signed the paper voluntarily. He was under no controlling necessity to sign without taking such time as might be needed to inform himself of its character. If he could not read it himself, there was no reason, except, perhaps, his own convenience or haste, why he should not postpone signing until he could have it read by some person upon whom he had a right to rely."

This case, while it does not in terms repudiate *Foster v. MacKinnon*, defines negligence in such a way that very little was left of the rule. Rule in *Mackey v. Peterson* changed by statute. See Minnesota Gen. Stat., 1913, Sec. 6015, and see *Yellow Medicine Co. Bank v. Tagley*, 57 Minn. 391, 394 (1894), where the court said: "This statute applies only when the party believes that he is not signing a negotiable instrument at all, and seems to be an adoption, with some modification, of the doctrine discussed in the case of *Mackey v. Peterson*, 29 Minn. 298, decided

that a party, who is unable to read, from whatever cause, and a third party is present or readily available, will be negligent if he does not request such third party to inform him of the contents of the paper, but relies upon a statement by the party with whom he is dealing as to the contents of the paper which he signs.<sup>23</sup> There are two exceptions: (1) where the third party present is associated in some way, not necessarily with respect to the pending transaction, with the person who requests the signature, in which case the signer will not be deemed negligent by failing to request such third party to read the instrument to him;<sup>24</sup> and, (2) in a case where there exist special reasons calculated to induce the signer to repose confidence in the party with whom he is dealing which are not present when the transaction is conducted with a stranger. In such a case the signer will not be negligent in relying upon the adverse party's statements.<sup>25</sup>

shortly prior to the passage of this law, and of which doctrine *Foster v. Mackinnon*, L. R. 4 C. P. 704 is the leading case." See also *Bedell v. Hering*, 77 Cal. 572 (1888).

*Hinkley v. Freick*, 112 Minn. 239, 242 (1910): "We are of opinion that this statute did not extinguish, repeal, or modify the common-law defense [that fraud was a defense against a holder not in due course], but added a new and additional defense."

<sup>23</sup>*Lindley v. Hofman*, *supra*, n. 16, at pp. 244, 245: In distinguishing *Webb v. Corbin*, *supra*, n. 16, the court said: In that case the maker could not read and could not see and lived by himself two miles from any town. "Under these facts it was held that he had a right to rely upon the representations of those with whom he was dealing, and that he was not guilty of negligence." In the present case "it was shown that [the maker] had a wife, and it is possible that he had children. He does not aver that his wife could not read. It is not shown that he could not have procured some one other than McGee [the adverse party] to read the note for him, or that he lived remote from other persons who could read."

<sup>24</sup>*Nat. Exchange Bank of Auburn v. Veneman*, 43 Hun (N. Y.) 241 (1887), *supra*, n. 14, 21: Judgment for defendant affirmed. Defendant could not read English. A 17 year old boy, who had driven the stranger to defendant's place was present but was not asked to read the paper. The court said, at p. 245: "As the maker could not read the English language he was obliged to rely upon the representations made by the other party, or consult \* \* \* some third person. \* \* \* It cannot be said \* \* \* that it was negligence *per se* not to seek his neighbors and learn from them the contents of the writing. The subject matter of the negotiations was not of great importance \* \* \*." With respect to the failure of the maker to exhibit the paper to the boy the court continued, at p. 246: "\* \* \* this young man was the apparent companion or servant of the party with whom the defendant was transacting the business; and were it not for that circumstance we should be of the decided opinion that it was the duty of the defendant to consult him as to the contents of the paper."

<sup>25</sup>*First Nat. Bank v. Hall*, *supra*, n. 16: Judgment for plaintiff affirmed. Trial court held defendant, who could not read, negligent because he did not request his sons who were present and who could read, to read the instrument to him. The court said: "We do not think that in every instance an illiterate man must ask some one other than the party seeking his signature to an instrument to read it before he signs it. In the case of \* \* \* an old acquaintance and trusted friend, carelessness might not be imputed if the signer was deceived by relying on the representations of the other party. The facts before us are different."

*Bowers v. Thomas*, *supra*, n. 19, 21: Judgment for plaintiff reversed because of trial court's refusal to charge the jury that the defense was available if defendant was by fraud, induced to believe that the note was for a sum less than what

If a third party is present and the maker requests and obtains information from him which proves to be untrue and the signer is still misled, he has done all the law requires of him and accordingly is not deemed negligent.<sup>26</sup> Or, if after having obtained correct information from the third party and by a trick subsequently perpetrated upon the signer, he is induced to affix his signature to some paper other than the one which was read to him, he not being negligent in failing to discover the trick, will not be regarded as negligent.<sup>27</sup>

Where the signer is able to read and does not do so, there are three somewhat divergent rules. The prevailing rule is that in the case of a signer who is able to read but does not read the paper submitted to him and relies upon the statement or purported reading by the party with whom he is dealing, it is a question of fact for the jury or for the trial court sitting without a jury, whether such a signer is to be deemed negligent. But there is a strong tendency to reverse a finding of no negligence when the case is reviewed on the evidence.<sup>28</sup> The second

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it was. On the question of negligence court said, at p. 485: "The facts proved in this case were, we think, sufficient to negative any want of reasonable care on the part of the appellant. \* \* \* he could not read the instrument he was called upon to sign; the other signer was the father of the person for whose benefit the note was made, and he could not read it; but he was a man in whom the appellant had confidence. The only other person present when the note was signed was the son, for whose benefit the note was given. Under this evidence it seems to us that it was clearly a question of fact for the jury whether the appellant was chargeable with any negligence in signing the note in question, without taking further measures to ascertain the nature of the contract he was signing."

<sup>26</sup>*Shenandoah Nat. Bank v. Gravatte, supra*, n. 15: Judgment for defendant affirmed. The court said the question of negligence was for the jury. The party who obtained the note was accompanied by a real estate agent who appeared to be disinterested. This party confirmed the statement of the other party that the instrument was but a receipt. The court continued, at p. 596: "Assuming that this testimony is true, \* \* \* we do not think it can be said, as a matter of law, that [the maker] was guilty of negligence in signing the instrument. In fact he did what most men would have done under like circumstances. He availed himself of the best and only means at hand for informing himself of the contents of the paper."

<sup>27</sup>*First Nat. Bank of Watonga v. Wade, supra* n. 7, 16, 21: Decree of cancellation affirmed. Maker could not read. Instrument was read to maker by a girl residing with her. Payee diverted maker's attention and substituted the note signed. The court said she took every precaution possible to know the exact contents of the papers before she signed them and was not negligent.

<sup>28</sup>*Nebeker v. Cutsinger, supra*, n. 16, at p. 451: Judgment for defendant reversed. "(\* \* \* Where a man who can, without difficulty, read, executes a paper without reading it, trusting to the party to whom it is executed for a statement of its contents, or trusting to the reading of it by the latter, there being no substantial reason shown for not reading it himself, is guilty of negligence."

*Douglass v. Matting, supra*, n. 16, at p. 500: Judgment for defendant reversed. "It would be manifestly unjust to permit the maker \* \* \* to defeat the note, on the ground that through his own culpable carelessness while dealing with a stranger, he signed the instrument without reading it or attempting to ascertain its true contents."

*Freedley v. French, supra*, n. 9, at p. 342: "Whether she was negligent \* \* \* was a question of fact for the jury \* \* \* It can hardly be said, as matter of law, that a party is guilty of negligence who signs a paper relying upon the

view goes a step further and asserts that as a matter of law a person, signing under these circumstances, is negligent.<sup>29</sup> The third view takes the other extreme and declares that, under these circumstances a signer as a matter of law is not negligent.<sup>30</sup> But the court which held to this view for some time has since repudiated it and has adopted the view that, under these circumstances it is a question of fact for the jury.<sup>31</sup> There is one type of case, where even the courts,

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representations as to its contents and effect made by the party presenting it, and without himself examining it. If there may be such cases, this is not one of them."

*Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 110 (1900): Judgment for plaintiff affirmed. "[Maker] claims he could not read English, but admits \* \* \* that he could read enough to tell what the meaning of the contract was \* \* \*. His son, who acted as his bookkeeper, was present when the contract was signed \* \* \*. Neither the father nor the son read or tried to read the contract, though the defendant admits that there was nothing to prevent it. Under these circumstances there was clear neglect in signing the contract without ascertaining its contents."

<sup>29</sup>*Ort v. Fowler*, 31 Kan. 478, *supra*, n. 16, at p. 482: Judgment for plaintiff affirmed. Defendant could read but not having his glasses relied upon the statement by the party with whom he was dealing. The court said: "A party is betrayed into signing a bill or note by the assurance that it is an instrument of a different kind. Under what circumstances ought he to be liable thereon? One view entertained is, that as he never intended to execute a bill or note, it cannot be considered his act, and he should not be held liable thereon any more than if his name had been forged to such an instrument. A second view is, that it is always a question of fact for the jury whether under the circumstances the party was guilty of negligence. A third is the view adopted by the trial court, that as matter of law, one must be adjudged guilty of such negligence as to render him liable who, possessed of all his faculties and able to read, signs a bill or note, relying upon the assurance or the reading of a stranger that it is a different instrument. We approve of the latter doctrine."

<sup>30</sup>*Anderson v. Walter*, 34 Mich. 113, 120 (1876): Judgment for defendant affirmed. "I concede there may be cases where a party signing \* \* \* an instrument should be bound by the terms thereof, even though it turned out different from what he supposed it to be; but such cases cannot be carried so far as to hold that a party signing in good faith what he has heard read, and what purports to be a power of attorney, contract, deed, mortgage, or any similar instrument, shall afterwards be held liable in case a negotiable note of that date, which he did not know or suppose he was signing, turns up. No man has a right to suppose that a crime is about to be committed, or that he is going to be defrauded \* \* \*."

*First Nat. Bank of Sturgis v. Deal*, *supra*, n. 15, at p. 594: Judgment for defendant affirmed. "It is a matter of every-day practice for persons to trust to the reading by others of documents which they sign, and this practice is necessary for the convenient transaction of business. It would do more harm than good to compel all persons who sign papers to trust to their own reading, which in many cases would be impracticable. While the negotiability of commercial paper should not be unduly hampered it is not desirable to encourage dealing with entire strangers and irresponsible persons on the faith that every genuine signature is binding on its maker in spite of fraud or forgery. It cannot be said that the equities of purchasers are any greater than those of innocent persons who have done nothing negligently or unfairly to mislead them. We see no reason to change the views on which this Court has hitherto acted, and we cannot see any new feature in this case."

<sup>31</sup>These Michigan cases were virtually overruled in *Van Slyke v. Rooks*, *supra*, n. 17, wherein the court in reversing a judgment for defendant said, at p. 96: "We think it was the duty of the trial court to have charged more fully than it did upon the question of \* \* \* negligence \* \* \*; in saying this we are well aware of



which declare it to be negligence as a matter of law for one who can read to sign without reading, would probably depart from that rule and regard the question as one of fact. That situation arises when, from the nature of the trick practiced upon him, the signer is thrown off his guard.<sup>32</sup> The conflict of authority with respect to the standard of due care appears not only in its application to specific sets of facts but also in its more general aspects.<sup>33</sup>

One aspect of the rule, of theoretical interest largely, may be mentioned. Where liability, in favor of the holder in due course is imposed, it is said that the basis of such liability is the signer's negligence. This does not represent a confusion of the principles of torts and contracts. A negotiable instrument is one form of contract and as such its enforceability depends upon agreement, the essence of which is intention. When it is said that one's failure to gain a

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the extent to which this court has gone upon this subject." The court cited its former decisions but quotes liberally from the Iowa cases and apparently relies upon them.

<sup>32</sup>*Yakima Valley Bank v. McAllister*, 37 Wash. 566, 571 (1905): Judgment for defendant affirmed. When the maker signed a release knowing that he was signing such an instrument he was told "to bear down hard." His signature penetrated through the paper and appeared as an indorsement upon a note which he had knowingly executed payable to his own order but intended not to indorse and deliver it until he thought about the proposed transaction further. "It is not the physical act which constitutes a transaction of this kind, but it is the intention of the parties to the contract. It is true that if a party [is negligent] \* \* \* he cannot escape liability; but, if the matters set forth in the answer are true, there was no action on the part of the defendant at all, so far as indorsing the note was concerned."

*Maurmair v. Nat. Bank of Commerce*, 158 Pac. (Okla.) 349 (1916): Plaintiff's signature to a check affixed by means of deception practiced upon him by a third party placing a carbon paper under some papers which the signer knowingly signed. Held: a forgery.

*Brown v. Reed*, *supra*, n. 16, at p. 372: The contract was "so cunningly framed that it might be cut in two parts, one of which with the maker's name would then be a perfect negotiable note. Whether there was negligence in the maker was clearly a question of fact for the jury."

*Robb v. Penn. Co. for Ins., etc.*, 186 Pa. 456 (1898): Drawer's name was signed to a check by a third person by the unauthorized use of a rubber stamp which plaintiff kept. The stamp was kept locked in a drawer. Held, to be a forgery, plaintiff not negligent in his care of the rubber stamp bearing his signature.

<sup>33</sup>*Mitchell v. Tomlinson*, *supra*, n. 16, 21: The court, at p. 170, said: "We think, under the facts stated [maker 70 years of age, an invalid for thirty years, able to read only with great difficulty] that [defendant] acted with the degree of care required by law, namely, with the prudence of ordinary men similarly situated."

But in *Dinsmore & Co. v. Stimbert*, 12 Neb. 433, 439, 438 (1882): where judgment for defendant was reversed, the court said: "We do not think it sufficient, in the language of the instruction, that the defendant should have used the diligence and care that a man of ordinary care and prudence would have used under similar circumstances, in order to throw the loss on the *bona fide* purchaser \* \* \*. We think that the defendant, before he can successfully defend on account of having been fraudulently induced to execute the note, must show a higher degree of diligence than that expressed in the instruction. \* \* \* in the language of Byles, J., [in *Foster v. MacKinnon*] he should have been not guilty of any negligence in so signing the paper."

knowledge of certain facts imposes upon him a contractual duty to an innocent purchaser two distinct propositions are had in mind. The first is, that proof of knowledge of certain facts by the signer—delivery aside for the moment—establishes the existence of the contract. The second is, that proof that the signer was so situated that by the exercise of reasonable care he could have acquired this knowledge, shall have the same operative effect as his actual knowledge. Proof of negligent conduct, therefore, simply represents another group of facts which operate to establish the existence of the element of intention or knowledge. Thus the knowledge spoken of in the first branch of the rule is, by the second, admitted to be a dispensable element. If it be a dispensable element what is the necessity for its appearing in a statement of the rule? The reply may be that, while proof of the knowledge referred to in the rule may be dispensed with, it will not be possible to dispense with this phase of the rule entirely because it must always be retained as a basis for the determination of what constitutes negligence. That is true, as long as the negligence branch of the rule is retained, because the two are undoubtedly interdependent and cannot exist separately. Any change in the statement of the first part of the rule as commonly put would either destroy or call for modification of the second.

This situation, however, discloses the possibility of framing a single rule, worded in terms of knowledge of the signer, without reference to the principle of negligence. If that be done, the knowledge referred to in the restatement would not be the same knowledge as that designated in the rule as now formulated, because it would be necessary to incorporate in the revised phraseology a generalization envisaging all of the mental elements which appear as common factors in that line of cases where the signer is held liable to the holder in due course on the basis of negligence. That is to say, in all those cases where the signer is held liable because he was negligent in failing to learn of certain facts, the signer did know something about the transaction. The signer always possesses affirmative knowledge of some kind, even if it be nothing more than that he is conscious that he is signing his name. If, therefore, the cases in which the signer is held liable because of his negligence be critically examined with a view to discovering therein what mental elements were common in all cases, these new factors could be assembled in a statement which would assert that their existence operated as an indispensable condition precedent to the existence of the negotiable contract. Such knowledge would constitute an irreducible minimum. The negligence aspect would then disappear, but the cases would be decided just as they are now decided.

Perhaps this phrasing of the rule would yield little return, but it would make possible the reduction to a single proposition, not only the bifurcated fraud in the inception rule but also the analogous, but independent, rules governing the signing of negotiable paper under duress or while the signer is in a condition of mental abnormality. The three types of situations here referred to possess the common factor that the issue of liability or of non-liability is to be determined with reference to the mental elements present at the time of signing. A rule which designated these essential elements would function in all three cases. As far as the phraseology of the rule is concerned, it would be the same whether the selected mental elements were regarded in a subjective or in an objective sense.

The rule in *Foster v. MacKinnon* has been repudiated in West Virginia.<sup>34</sup> This case presents the issue squarely as to whether the situation under discussion is the legal equivalent of any of the other recognized real defenses or whether it is more analogous to the intentional signing of a negotiable instrument under mistake induced by misrepresentation with respect to the thing for which it is given.

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<sup>34</sup>The status of the rule in Minnesota prior to the Statute is referred to in note 22, *supra*.

In *Rowland v. Fowler*, 47 Conn. 347, 349 (1879), the court reversed a judgment for defendant because an instruction was given which told the jury to find for the defendant if "he was made to believe that the paper on which he was placing his name was not a note, but an instrument of an entirely different character, and the defendant was guilty of no negligence." The court said: "It is quite possible that this language, applied to the claim of the defendant, misled the jury. The law is that the maker of a negotiable note is liable thereon to a purchaser for value before maturity, without notice of any defect, even if he misunderstood the legal effect of the instrument or was induced by fraudulent representations to execute it; and this without regard to the question of negligence." No cases were cited.

First Nat. Bank of Parkersburg v. Johns, 22 W. Va. 520, 532, 535 (1883): Defendant signed what he thought was a memorandum of the amount which would be due from him when he sold a certain number of washing machines. The judgment for defendant was reversed. The court disposes of *Foster v. MacKinnon* by saying that: "The doctrine [there] contended for seems to have no better foundation than a mere 'perhaps' of a distinguished American jurist, and an English decision, which says 'that the principle applicable to fraudulent deeds applies to other contracts including negotiable paper,' leaving out of view entirely that rule \* \* \* 'that where one of the [two] innocent parties must suffer, he, by whose act the loss occurred, must bear it'." Referring to the American authorities the court said: "It is feared that some courts, in their earnest desire to protect the citizen from the frauds of vendors of patents, have unwittingly struck the law merchant a fearful blow \* \* \*." The court adopted the rule that the innocent purchaser should recover, "unless at the time it was so purchased by him, it was absolutely void, \* \* \* although the maker was induced by fraud to sign it, not intending to sign such note, but a paper of an entirely different character, and in such case the question of negligence in the maker forms no legitimate subject of inquiry. This rule is absolutely necessary to the protection of innocent holders of commercial paper. And the interest of the whole community demands, that the rule be strictly adhered to." Followed in *Tower v. Whip*, 53 W. Va. 158 (1903), where maker signed a note thinking it was a memorandum of his post office address.

The case also presents the issue, freed somewhat from the atmosphere of deductive and inductive logic, as to whether the results are desirable from the standpoint of the requirements of business transactions which involve negotiable securities. The legal situation, in the narrow sense, is the common one where two rules of law, leading to opposite results, compete with each other for supremacy over a somewhat exceptional or unusual set of facts. In such a case a court is left free, within fairly wide limits, to select the rule which, from a line of inquiry and of observation, not strictly legal, it concludes will be preferable. The fact that the rule has met with almost universal adoption is a factor in its favor. Its existence probably has invited litigation. That fact may operate against it. As far as the interests of the maker are concerned, the rule is desirable, but from the innocent purchaser's standpoint it is not. These personal considerations are probably of secondary importance, and, moreover, tend somewhat to cancel each other. Any defense good against the holder in due course tends to retard the ready circulation of commercial paper, but on the other hand it is entirely conceivable, without suggesting that it would be wise to do so, that agriculture, manufacturing, the exchange of commodities and the transfer of credits would still go on, the bulk of the population being blissfully unaware of the change, if all personal defenses were made available against the innocent purchaser. The effect of the rule and of its abolition upon interest rates and the availability of credit are factors bearing upon the issue. Perhaps, after all, the business world is more interested in retaining the rule merely because it happens to be the rule, and because its various possibilities have been pretty well worked over and settled by the courts and accepted by the profession and the business community.

What is the status of the rule under the Negotiable Instruments Law? The Uniform draft of the Negotiable Instruments Law does not expressly preserve or repudiate this common law real defense. The question of its preservation depends upon the relative strength of its analogies to certain other defenses expressly dealt with in the Act. Some courts have said that the defense was real because of non-delivery of the instrument. Most courts, apparently, have regarded the transaction as one in which the instrument was acquired by fraud of such a nature as to constitute an independent real defense. Other courts have held that the acquisition of a negotiable instrument by trick constitutes forgery, or, if not technically a forgery, that in legal effect it is to be treated as tantamount to a forgery.

At common law, in addition to other formal requisites, the opera-

tive facts of signing and delivery were conditions precedent to the existence of the contract, and hence, conditions precedent to the liability of the signer to the holder in due course. Some few courts did, of course, dispense with the requisite of delivery of completed instruments in actions brought by a good faith purchaser. If, therefore, the facts which commonly appear in this line of cases are to be regarded not as evidentiary of the operative fact of signing but as evidentiary of the operative fact of delivery, then, under the Act, the situation is dealt with by sections 15 and 16, which concern the requisite of delivery of incomplete and of completed instruments. If the second view is adopted, under which the facts are regarded as constituting some kind of fraud, then the matter is governed by sections 55 and 57, which define defective titles and free the holder in due course from defenses and claims of ownership depending thereon. Finally, if the facts are more analogous to the facts of forgery than they are to those of non-delivery or of fraud, then section 23 applies.

If the facts bear upon the matter of delivery, then section 16 destroys the defense as regards completed instruments, but section 15 preserves it with respect to incomplete instruments. It is believed that this is not the proper solution, because the facts concern the question of execution rather than that of delivery. If the acts, by means of which the signature is obtained, are deemed fraudulent, then the question as to whether the defense is preserved by the Act is dependent upon the interpretation of the term "fraud" as used in section 55. If it be construed without reference to its historical setting then it would appear that the term should be given a meaning inclusive of both kinds of fraud. The defense would then be unavailable under the Act. If the term be interpreted by the historical method, the defense would be preserved in those states which recognized it at common law but would probably not be introduced in a state which had not, prior to the Act, let in the defense. This opens up, of course, one of the fundamental causes of the conflict among the authorities decided under the Act. Some courts, at some times, begin the study of the problem of interpreting and applying the Act by ignoring the meaning which the words or phrase interpreted possessed at common law, and construe them according to some other standard. Other courts and even the same courts, will begin to solve the same kind of problem by assuming a legislative intent to codify the common law results and accordingly interpret the language of the Act historically. But without going into this perplexing problem, it is believed that section 55 can be regarded either as having preserved

the defense or as having destroyed it and that there is nothing in the Act which by force of logic compels one result over the other. If the Act in a particular state contains a clause directing that the Act be interpreted to effectuate its general purpose of making the law uniform, that might cause the scales of justice to tip in favor of the preservation of the rule. Under the third view, where, at common law, a court held that the facts constituted forgery, the same type of problem of construction would arise as that just commented upon. The prophecy is fairly justifiable that, under the Act, the courts will continue to hold just as they were accustomed to hold at common law.<sup>35</sup>

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<sup>35</sup>Lewis v. Clay, 67 L. J. Q. B. (Eng.) 224 (1898); Alloway v. Hrabí, 14 Manitoba 627 (1904).

No case has been found in the United States which expressly decides what the effect of the N. I. L. has had upon this problem. But in two cases apparently governed by the Act it was assumed without discussion that the Act preserved the defense. First Nat. Bank v. Hall, 169 Iowa 218 (1915); Bothell v. Miller, 87 Neb. 835 (1910).